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No. 87-154

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSHUA DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, AND MELODY DESHANEY, PETITIONERS

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a county government and employees of its Department of Social Services can be held liable for violating the Due Process Clause of the Fourteenth Amendment by failing to prevent the abuse of a child by his father.

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INTEREST OF THE UNITED STATES

The Court's decision in this case may affect the extent to which federal employees may be held personally liable for acts committed in the course of their employment. Several agencies of the United States, particularly law enforcement agencies such as the Federal Bureau of Investigation, endeavor within reasonable and lawful limits to protect the general public, and sometimes particular individuals, from assaults and other kinds of harm. If petitioners prevail in this case, then persons who suffer such harm could sue individual federal employees who did not successfully prevent their injuries, on the theory that the federal employees' failure to provide sufficient protective services violates the Due Process Clause of the Fifth

Amendment and thus gives rise to a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. There has been no adjudication of the facts of this case. Because the case was resolved against petitioners on summary judgment below, the facts must be viewed in the light most favorable to petitioners.

On March 8, 1984, shortly before his fifth birthday, Joshua DeShaney was taken to the hospital and given emergency brain surgery. Joshua is now permanently and severely brain damaged and will be institutionalized the rest of his life. The cause of his brain damage was persistent abuse by his natural father, Randy DeShaney, who had custody of Joshua pursuant to a divorce decree previously entered by a Wyoming court. Pet. App. 37, 38-39, 50, 61; J.A. 121-123.

For some time before March 8, 1984, employees of the Winnebago County (Wisconsin) Department of Social Services suspected that Joshua was being abused. The Department's attention first focused on Joshua on January 22, 1983, when he was admitted to the Theda Clark Regional Medical Center for treatment of numerous bruises (J.A. 110-111).[1] Although child abuse was suspected at that time, and the Department obtained an order from a Wisconsin juvenile court placing Joshua temporarily in the hospital's custody (Pet. App. 37, 53-54), county attorney John Bodnar decided that there was not enough evidence to take the child abuse allegations to the juvenile court (J.A. 93). Proceedings in the juvenile court

[1] An earlier allegation that Randy DeShaney was abusing Joshua was made to the police department in January 1982 and may have been reported to the Department (see J.A. 152-153).

were terminated, and Joshua was returned to Randy DeShaney's custody on January 25, 1983 (Pet. App. 56).

Between January 22, 1983, and March 8, 1984, respondent Ann Kemmeter, a social worker in the Department, made various efforts to monitor Joshua's situation (see J.A. 110-121, 129-132). Through those efforts Kemmeter became aware of various injuries that Joshua suffered; Randy DeShaney and Marie DeShaney, the woman who lived with him, consistently attributed those injuries to accidents (*ibid.*). Kemmeter regularly recorded her suspicions that the cause of Joshua's frequent injuries was abuse rather than accidents (*ibid.*). There is evidence that she said, after the tragic events of March 8, 1984, that she "knew the phone would ring some day and Joshua would be dead" (Pet. App. 38-39; J.A. 107).

The Department persuaded Randy DeShaney to sign a contract promising to place Joshua in a Head Start program (where his condition could be monitored), but the Department never forced Randy to comply with that contract (Pet. App. 37-38, 56-57). The Department also never took various other steps that, in petitioners' view, a competent social worker would have taken in response to the evidence that Kemmeter gathered suggesting child abuse. Petitioners do not contend that anything respondents *did* harmed Joshua in any way; rather, they fault respondents exclusively for what they did *not* do. In particular, petitioners appear to fault the Department for not seeking court intervention in January 1983 (Pet. Br. 5); for not investigating various incidents of possible abuse more thoroughly (*id.* at 6, 26, 28); for not intervening on occasions when Joshua was found at home alone (*id.* at 6); for not visiting Joshua often enough and for not insisting on seeing him when Kemmeter did visit (*id.* at 7, 21); for not contacting Joshua's natural mother (petitioner Melody DeShaney), who lived in Wyoming (*id.* at 8, 32); for not

arranging medical care for Joshua (*id.* at 20-21, 22, 32); for not coordinating their efforts with those of the police (*id.* at 28); for not seeking "a court order making the family's participation mandatory" (*id.* at 32); and for not seeking foster home placement (*ibid.*). See also Pet. Br. 10, 12, 31 (relying on respondents' "refusal to act"); *id.* at 11 (relying on "right to be protected by the state"); *id.* at 13, 16 (relying on "affirmative duty" of protection); *id.* at 18 (relying on "right to receive appropriate protection"); *id.* at 28 (relying on respondents' alleged failure to "perform the functions and duties which were mandated under the [state] statute").

2. Joshua (by a guardian ad litem) and his mother sued the agency and its employees in federal court under 42 U.S.C. 1983, alleging that their failure to protect Joshua from Randy DeShaney's abuse constituted an unconstitutional deprivation of Joshua's liberty or property without due process of law. The district court granted summary judgment to the defendants. (The court also dismissed pendent state-law tort claims against these defendants and against Randy DeShaney without prejudice.) Pet. App. 47-75. The court reasoned that "[t]he Fourteenth Amendment's concept of liberty does not include the right to basic public services" (*id.* at 62) in the absence of a "special relationship" between the individual and the state (*id.* at 63). The court also held that, although there was "no bright line by which the existence of a special relationship for Section 1983 purposes may be determined" (*id.* at 65), there was no such relationship on the facts of this case (*id.* at 66-73).

The court of appeals affirmed. The court hypothesized two different "rights" of which Joshua might claim to have been deprived: (1) "a right—a form of liberty or property—to be protected by the Department of Social Services from the brutalities perpetrated by his father"; and (2) "his

right to bodily integrity (again viewed as a form of liberty or property within the meaning of the due process clause)" (Pet. App. 39). The court disposed of the first hypothesized "right" summarily by invoking "the rule, well established in this circuit, that the state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty" (*id.* at 39-40).

Focusing on the second hypothesized "right" at greater length, the court restated the question as whether "the state was complicit in the beatings" (Pet. App. 41), and proceeded to discuss the issue in terms of causation (*id.* at 41-43). The court found causation to be lacking, apparently on the theory that the state did not increase the probability of harm but merely failed to decrease it. The court distinguished this case from one "where the state places the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becoming a cause of the harm" (*id.* at 43). The court also explicitly "reject[ed] the proposition embraced by a divided panel of the Third Circuit in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (1985), that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from the abuse" (Pet. App. 44). The court acknowledged that in prison cases there is a "special relationship" that has been held to place limited constitutional duties (under the Due Process Clause) on the state to protect inmates from certain kinds of harm, but the court declined to extend the concept to cases like this one on the ground that what is "special" about that relationship is not present in this setting: "the prison authorities, having placed the inmate in a position of danger, cannot shrug off all

responsibility when the danger materializes and injury results" (*id.* at 45).

SUMMARY OF ARGUMENT

Petitioners must show a deprivation by respondents of a right secured by the Constitution, not just a tort that may be cognizable under state law, in order to prevail. Specifically, petitioners must show that respondents deprived Joshua DeShaney of liberty or property without due process of law. In an effort to identify a constitutional violation, they rely on two theories: (1) that Joshua DeShaney had a constitutional right, based on the importance of a child's safety and the relationship between the child and a child protection agency, to a minimum level of protection of his personal security; and (2) that respondents disobeyed state law, which petitioners regard as a form of deprivation of a due process entitlement to the benefit of that law.

A. Randy DeShaney, not respondents, deprived Joshua DeShaney of his liberty. An expansive interpretation of the word "deprive," which would cover respondents' *failure to prevent* that deprivation, is contrary to the historical purpose of the Due Process Clause. That Clause was intended to prevent the arbitrary exercise of the powers of government; to prevent affirmative abuses of power; and to bar government oppression. Petitioners seek to recover not because they have suffered from any such arbitrary exercise of power, abuse of power, or oppression, but because the power of government was *not* used to save Joshua DeShaney from his father. Any duty to use that power, however, derives from the common law and not the Due Process Clause.

In particular, the Clause is not a plausible source of duties to provide social welfare services. It was designed

to protect the individual from the things an overzealous government might do to him, not to guarantee services that were virtually unknown when the Fourteenth Amendment was adopted. Nor should the Clause be interpreted to regulate the competence with which such services are provided once the state elects to provide them. That is the classic function of tort law, not a plausible function of a Clause explicitly worded so as to protect against government deprivations.

Although this Court has found in the Due Process Clause mandatory duties to provide services in certain contexts, those contexts are ones in which the state has already deprived the individual of liberty. Prisoners and institutionalized mental patients have constitutional rights to minimum protective services because the state cannot fail to provide such services as an incident to depriving them of their liberty, not because the failure is itself a deprivation of liberty. Thus, most courts of appeals have interpreted the Due Process Clause to apply to state inaction only when it is the state itself that has put the person in a position of danger. The contrary holding of a divided panel of the Third Circuit, and dicta of the Fourth Circuit, have been rejected by several courts of appeals and should be rejected by this Court. The Court also should not constitutionalize duties to provide social services merely because the State may have precluded others from providing such services. Such a ruling would create sweeping new potential for government liability and would lose sight of the fundamental purpose of the Due Process Clause to prevent the misuse of power, rather than to compel its use.

B. Petitioners' contention that Joshua DeShaney had a federal constitutional right to have respondents comply with state law is without merit. This Court has rejected such wholesale translation of state law into federal constitutional law in the past and should continue to do so. The cases on which petitioners rely are *procedural* due

process cases that hold that state law can define the entitlements that a State may not take away without providing fair procedures. Petitioners have not challenged the adequacy of the relevant Wisconsin procedure (its tort law), and the cases on which they rely do not stand for the much broader proposition that state law itself is enforceable through the federal Constitution.

ARGUMENT

RESPONDENTS DID NOT "DEPRIVE" JOSHUA DeSHANEY OF LIBERTY OR PROPERTY WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

The question presented in this case is not whether petitioners should have a remedy for respondents' inaction in the face of evidence suggesting a need to protect Joshua DeShaney from his father. That question is of the sort that the law of torts has addressed for centuries. This case presents the different question whether the *Constitution* was violated by respondents' inaction. Tort-law concepts have little, if any, utility in answering that question, for this Court has repeatedly emphasized that "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker* v. *McCollan,* 443 U.S. 137, 146 (1979); accord *id.* at 142; *Daniels* v. *Williams,* 474 U.S. 327, 332 (1986); *Parratt* v. *Taylor,* 451 U.S. 527, 544 (1981); *id.* at 549 n.7 (Powell, J., concurring in the result); *Martinez* v. *California,* 444 U.S. 277, 285 (1980); *Paul* v. *Davis,* 424 U.S. 693, 701 (1976). The Court has emphatically "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already be administered by the States' " (*Daniels* v. *Williams,* 474 U.S. at 332 (quoting *Paul* v. *Davis,* 424 U.S. at 701)).

Petitioners' constitutional claim under Section 1983 depends on whether respondents can be said to have disobeyed the constitutional command "nor shall any State deprive any person of life, liberty, or property, without due process of law" (U.S. Const. Amend. XIV, § 1). Petitioners seek to fit their claim within the terms of the Clause in two ways. First, they argue that respondents violated the Constitution by allowing Randy DeShaney to take from Joshua his liberty interest in personal security that is protected against state deprivation by the Due Process Clause (see *Ingraham* v. *Wright,* 430 U.S. 651, 673 (1977))—an "interest in freedom from bodily harm" (*Daniels* v. *Williams,* 474 U.S. at 341 (Stevens, J., concurring in the judgment)). Second, petitioners argue (Pet. Br. 24-29) that the Wisconsin Children's Code, Wis. Stat. Ann. §§ 48.01 *et seq.* (West. 1987), gives children such as Joshua DeShaney an entitlement—a form of "liberty" or "property"—to receive social welfare services in accordance with the terms of the statute, and that a failure to comply with any portion of the statute therefore constitutes a "depriv[ation]" of that interest that is proscribed by the Constitution. We submit that neither theory is correct.

A. Respondents Did Not Deprive Joshua DeShaney of His Liberty Interest in Personal Security

We begin by stating the obvious: Respondents did not inflict the beatings that deprived Joshua DeShaney of his liberty interest in personal security. Randy DeShaney did. Like the parolee responsible for the murder at issue in *Martinez* v. *California, supra,* Randy DeShaney "was in no sense an agent of [respondents]" (444 U.S. at 285) when he subjected Joshua to terrible abuse. Thus, in the sense in which the word is ordinarily and naturally used, respond-

ents did not "deprive" Joshua DeShaney of personal security.[2]

"Historically, [the Fourteenth Amendment] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. * * * This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, * * * was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams,* 474 U.S. at 331 (citations and internal quotation marks omitted). Petitioners cannot claim that respondents made any deliberate decision to harm Johsua DeShaney or arbitrarily exercised the powers of government. Instead, petitioners seek redress because respondents allegedly *failed* to exercise the powers of government to save Joshua DeShaney in a situation in which, viewing the record in the light most favorable to petitioners, it may have been egregiously wrong not to do so. If "we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power' "

[2] See *Archie* v. *City of Racine,* 847 F.2d 1211, 1215 (7th Cir. 1988) (en banc) ("Giese did not deprive DeLacy of her life. Emphysema and pneumonia did that."); *Bradberry* v. *Pinellas County,* 789 F.2d 1513, 1518 (11th Cir. 1986) ("The state did not kill Kenny Ray Thomas, the ocean did."); *Estate of Gilmore* v. *Buckley,* 787 F.2d 714, 720 n.10 (1st Cir.) ("[I]f state officials (absent 'special circumstances' * * *) do no more than act erroneously—even if the error is egregious—and the killer is not an officer of the state but is a private third party, we think the essential element of the state's having worked a deprivation is missing."), cert. denied, 479 U.S. 882 (1986); *Jackson* v. *Byrne,* 738 F.2d 1443, 1446 (7th Cir. 1984) ("Although there were deaths in this case, the state did not, within the meaning of the Fourteenth Amendment, 'deprive' plaintiffs' decedents of life. The fire killed Santana and Tommy Jackson, government officials did not."); *Estate of Bailey ex rel. Oare* v. *County of York,* 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting).

(*Daniels* v. *Williams,* 474 U.S. at 330, quoting *Parratt* v. *Taylor,* 451 U.S. at 549 (Powell, J., concurring in the result)), then petitioners' lawsuit most assuredly does not belong in federal court, because it is respondents' non-use of power, not affirmative abuse of power, that petitioners assert is a violation of the Constitution. If petitioners' argument were correct the holding of *Daniels* that the Due Process Clause is not generally violated by negligent or inadvertent impositions but principally by intentional ones would be rendered nugatory in a class of case that bears even less relation to the Due Process Clause than those where the defendant official actually though unintentionally inflicts the harm. For in most cases of omissions the harm comes about, not because state officials intended it, but because they *neglected* to prevent it, a case that would seem to raise if anything less of a due process concern than *Daniels.*[3]

[3] The Court need not pause long over the argument of amici the American Civil Liberties Union Children's Rights Project, et al., that there is no relevant distinction between action and inaction, or omission and commission, for purposes of determining the requirements of the Due Process Clause (Br. 46-52). That argument is squarely contrary to the reasoning of the Court in *Daniels* v. *Williams, supra.* Furthermore, even if amici could succeed in showing that there are situations in which it is difficult to distinguish between a claim that the state's action violated the Constitution and a claim that the state's failure to act violated the Constitution, such a showing would neither make the action/inaction distinction irrelevant nor obscure in any way the pellucid fact that the delicts alleged in this case all consist of respondents' inaction in the face of circumstances calling for action, rather than the opposite. As the Court said in addressing a similar argument in *Daniels* v. *Williams*—that negligence should not be distinguished from intent—"the difference between one end of the spectrum * * * and the other * * * is abundantly clear" (474 U.S. at 335).

Petitioners do not seek to use the Due Process Clause to "bar[ ] certain government actions regardless of the fairness of the procedures used to implement them * * * [and thus] prevent governmental power from being 'used for purposes of oppression.' " *Daniels* v. *Williams,* 474 U.S. at 331 (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 59 U.S. (18 How.) 272, 277 (1856)). Rather, they seek to use the Due Process Clause to *require* certain government actions and thus to insist on a use of governmental power to relieve persons from the dangers posed by others in society. That may be a noble goal, and a proper objective of state tort law. But it is not the case that "all common-law duties owed by government actors were somehow constitutionalized by the Fourteenth Amendment" (*Daniels* v. *Williams,* 474 U.S. at 335).

That is particularly true of any possible duty to act with minimum competence in providing social welfare services. This Court has stated explicitly that, "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border." *Youngberg* v. *Romeo,* 457 U.S. 307, 317 (1982) (citing *Harris* v. *McRae,* 448 U.S. 297, 318 (1980); *Maher* v. *Roe,* 432 U.S. 464, 469 (1977)). "The Due Process Clause is phrased in the negative. It says that a state shall not 'deprive' residents of life, liberty, or property, save with due process. It does not require the state to furnish residents with property they lack, or ensure that they do not suffer loss at private hands." *Archie* v. *City of Racine,* 847 F.2d at 1220. "The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic government services." *Jackson* v. *City of Joliet,* 715 F.2d 1200, 1203 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).

It is no answer to say that the Constitution, while imposing on the States no duty to provide social welfare services, nevertheless regulates the care with which such services are provided once the State elects to provide them. The constitutional guarantee is that the State will not—through social welfare services or any other means—"deprive any person of life, liberty, or property, without due process of law." By no feat of alchemy can that constitutional guarantee be transmuted into an assurance that the State, once it undertakes to protect against certain deprivations caused by persons other than agents of the State, will not permit any such deprivation that a competent performance of the State's undertaking would have prevented. Any such assurance is a feature of tort law that has nothing to do with the words used in or the purpose of the Due Process Clause. See *Bradberry* v. *Pinellas County,* 789 F.2d 1513, 1517-1518 (11th Cir. 1986); *id.* at 1516-1517 (citing *Jackson* v. *City of Joliet,* 715 F.2d at 1205); *Wideman* v. *Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1037 (11th Cir. 1987).[4]

This straightforward reading of the Due Process Clause is consistent with the cases in which this Court has interpreted the Clause to require the provision of particular

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[4] The concluding observations made by the First Circuit in a similar case are pertinent here (*Estate of Gilmore* v. *Buckley,* 787 F.2d at 722-723):

> Enormous economic consequences could follow from the reading of the fourteenth amendment that plaintiff here urges. Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called, arrive late; and myriad other errors by state officials in providing protective services, could all be found to violate the Constitution. It would seem appropriate that the citizenry, acting through state legislatures and state courts, should determine how far it wishes to go in reimbursing claims of this type.

services in particular settings. The common feature of all such cases is that the State has *already* deprived the individual of his liberty before any duty arises, and it is entirely compatible with the language of the Due Process Clause, and its historical purpose to prevent affirmative abuses of government power, to hold that the deliberate, state-inflicted deprivation of liberty that has already occurred goes too far when it is accompanied by neglect of the individual's basic needs. For example, institutionalized mental patients have a right under the Due Process Clause to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint" (*Youngberg* v. *Romeo,* 457 U.S. at 319) specifically because the individual is "institutionalized * * * and wholly dependent on the State" (*id.* at 317). To recognize such a right is not to suggest that those whom the State has never previously deprived of liberty can insist that a State's failure to save them from harm inflicted by third persons is itself a deprivation of liberty within the meaning of the Due Process Clause.

Likewise, any due process right to medical care that may belong to prisoners and others involuntarily in state custody (see *West* v. *Atkins,* No. 87-5096 (June 20, 1988) (Scalia, J., concurring in part and concurring in the judgment); cf. *Estelle* v. *Gamble,* 429 U.S. 97 (1976) (Eighth Amendment)) stems from the fact that the State has already deprived them of liberty. The denial of medical care itself, unaccompanied by any other deprivation of liberty, is not itself a deprivation of liberty. And, if prisoners have any due process right to be protected from assaults by other prisoners when the failure to prevent the assault amounts to more than negligence but less than an intentional tort—an issue this Court has not decided (see *Daniels* v. *Williams,* 474 U.S. at 334 n.3; *Davidson* v. *Cannon,* 474 U.S. 344 (1986))—then, again, the logical

basis for that right is that imprisoning a person and exposing him to an accompanying risk of violence that he is, by virtue of his imprisonment, unable to avoid, and that the State (in some aggravated way) neglects to prevent, is too great a deprivation for the Constitution to tolerate. See also *Davidson* v. *Cannon,* 474 U.S. at 355 (Blackmun, J., dissenting) (emphasis added) ("where the State *renders* a person vulnerable and strips him of his ability to defend himself, an injury that results from a state official's negligence in performing his duty is peculiarly related to the governmental function").

The lesson that most of the courts of appeals have correctly drawn from the Constitution itself and from this Court's cases is that a tort, in order to rise to the level of a violation of the Due Process Clause, must at a minimum involve some action of the state that creates the victim's predicament, and not just inaction in the face of a predicament that is not of the state's making. Only if the state has placed the individual in a position of danger can it be said to have deprived him of life, liberty, or property. Thus, whether or not their reasoning and results are ultimately correct, cases such as *Doe* v. *New York City Dep't of Social Services,* 649 F.2d 134 (2d Cir. 1981), after remand to district court, 709 F.2d 782, cert. denied, 464 U.S. 864 (1983), and *Taylor ex rel. Walker* v. *Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc), petition for cert. pending, No. 87-521, are not contrary to the decision below. Those cases are at least arguably consistent with the rule that the state violates the Due Process Clause only by acting so as to deprive a person of liberty, and not merely by passively allowing a third party to deprive someone of liberty. In each of those cases, the state had taken the affirmative step of placing the child in the care of the child's eventual abuser. In the present case, respondents took no such affirmative step; they merely failed to remove Joshua

DeShaney from his father's preexisting custody. Likewise, numerous courts of appeals have endorsed the principle, stated repeatedly by the Seventh Circuit,[5] that duties to protect a person arise under the Due Process Clause only when "the state itself has put [that] person in danger." *Escamilla* v. *City of Santa Ana,* 796 F.2d 266, 269 (9th Cir. 1986); see *Wood* v. *Ostrander,* No. 87-3924 (9th Cir. July 13, 1988), slip op. 8555 & n.5; *Wideman* v. *Shallowford Community Hosp., Inc.,* 826 F.2d 1030, 1035, 1037 (11th Cir. 1987); *Ketchum* v. *Alameda County,* 811 F.2d 1243, 1247 (9th Cir. 1987); *Washington* v. *District of Columbia,* 802 F.2d 1478, 1481-1482 (D.C. Cir. 1986); *Bradberry* v. *Pinellas County,* 789 F.2d 1513, 1517 (11th Cir. 1986); *Estate of Gilmore* v. *Buckley,* 787 F.2d 714, 722 (1st Cir.), cert. denied, 479 U.S. 882 (1986); see also *Rankin* v. *City of Wichita Falls,* 762 F.2d 444, 449 (5th Cir. 1985).

This Court should specifically reject—as the First, Seventh, Eighth, and Eleventh Circuits have specifically rejected[6]—the notion espoused by a divided panel of the

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[5] Pet. App. 43-44; *Archie* v. *City of Racine,* 847 F.2d at 1222-1223; *id.* at 1226 (Posner, J., concurring); *Walker* v. *Rowe,* 791 F.2d 507, 511 (7th Cir.), cert. denied, 479 U.S. 994 (1986); *Ellsworth* v. *City of Racine,* 774 F.2d 182, 185 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986); *Beard* v. *O'Neal,* 728 F.2d 894, 899-900 (7th Cir.), cert. denied, 469 U.S. 825 (1984); *Jackson* v. *City of Joliet,* 715 F.2d at 1204-1205; *Bowers* v. *DeVito,* 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."); see also *White* v. *Rochford,* 592 F.2d 381 (7th Cir. 1979).

[6] *Estate of Gilmore* v. *Buckley,* 787 F.2d at 721-722; *Archie* v. *City of Racine,* 847 F.2d at 1223; Pet. App. 44-45; *Harpole* v. *Arkansas Dep't of Human Services,* 820 F.2d 923, 926 (8th Cir. 1987); *Wideman* v. *Shallowford Community Hosp., Inc.,* 826 F.2d at 1035-1036.

Third Circuit in *Estate of Bailey ex rel. Oare* v. *County of York,* 768 F.2d at 510-511, and by dicta in *Jensen* v. *Conrad,* 747 F.2d 185, 190-194 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985), that a tort suit for government inaction becomes a tenable claim under the Due Process Clause when the state undertakes to protect against, but did not create, the danger to a specific individual. This approach promotes an indefinite array of state-law services into constitutional rights by first affixing the label "special relationship," and then broadly construing that label to include as a beneficiary of constitutional protection anyone whose danger is known to a state actor whose job involves protection against that danger. In that way, it conveniently distinguishes *Martinez* v. *California, supra,* in which the Court gave as one of its reasons for denying relief the fact that the murder victim was no more foreseeably in danger than any other member of the general public (444 U.S. at 285). What this approach does not do, however, is address the concern of the Due Process Clause: to forbid States from *depriving* persons of liberty without due process of law. Instead, this expansive approach provides "a category in which to dump cases when a court would like to afford relief" (*Archie* v. *City of Racine,* 847 F.2d at 1223). It is nothing more than a way to make the Due Process Clause into " 'a font of tort law to be superimposed upon whatever systems may already be administered by the State,' " which is exactly what this Court has said that courts should not do (*Daniels* v. *Williams,* 474 U.S. at 332 (quoting *Paul* v. *Davis,* 424 U.S. at 701)).

Finally, respondents cannot be charged with having deprived Joshua DeShaney of his liberty in the constitutional sense—as opposed to having committed a tort—merely because of the possibility that others might have come to Joshua's aid if respondents had not been assigned by state law the primary or even exclusive role in safeguarding the

welfare of abused children. It is the nature of modern society that citizens look to the government to provide many basic protective services—police services, fire protection, consumer protection, and social services are examples—that might be provided, on an organized or an ad hoc basis, by others if the government did not provide them.[7] To treat that fact as a sufficient reason to hold the government liable for a *constitutional* violation, whenever it falls short (or far short) of standards for the reasonable performance of that function, would go a long way to nullify the principle that not every tort committed by a government actor is a violation of the Due Process Clause.[8] Whether a particular power (such as the power to intervene on behalf of abused children) is possessed ex-

[7] Thus, as the Seventh Circuit observed in *Jackson* v. *Byrne*, 738 F.2d at 1447, in holding that the City of Chicago and its officials could not be held liable for the deaths caused by a fire that the City failed to prevent, and did not assist striking firefighters to prevent,

> We are not unmindful of the argument that the city acquired a constitutional duty to provide services once it established itself as the provider of fire protection and thereby lessened the incentive for private citizens to protect themselves. The same theory, however, would lead to liability when a state takes on the task of removing the criminally insane from society and then releases a lunatic who has not been cured of his propensity for violence, *see Bowers* [v. *DeVito*], *supra*, or when a municipality sets speed limits for train traffic at railroad crossings and then refuses to enforce its own train speed ordinance, *see Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir.1982). In neither case did the governmental unit deprive a victim of life by omitting to perform a constitutionally cognizable duty. We decline today to break with the *Bowers* and *Hull* line of reasoning. To do so would open the way for scrutiny by the federal courts of virtually every municipal decision to reallocate protective resources. Neither the Fourteenth Amendment nor Section 1983 was meant to give the federal courts such a role. *See Jackson* [v. *City of Joliet*, 715 F.2d] at 1204.

[8] Indeed, even under tort law this Court has observed, through Justice Brandeis speaking for a unanimous Court, that there is no

clusively by the government or not, the Due Process Clause simply was not intended to *compel* the use of such power but only to prevent its misuse. *Parratt* v. *Taylor*, 451 U.S. at 552 n.10 (Powell, J., concurring in the result). The failure to act when a reasonable person would act is the province of tort law, not the Due Process Clause.

B. Respondents' Alleged Violations of State Law Do Not Constitute Violations of the Due Process Clause

Petitioners' alternative theory (Pet. Br. 24-29)—that each and every duty imposed on respondents by state statutory law is one whose violation, without more, amounts to a violation of the Due Process Clause and gives rise to a potential federal cause of action—was labeled "obviously frivolous" by former Chief Justice Burger (*Youngberg* v. *Romeo*, 457 U.S. at 330 n.* (Burger, C.J., concurring in the judgment); contra *id.* at 325 (Blackmun, J., concurring)). "[W]ere every substantive right created by state law enforceable under the Due Process Clause, the distinction between state and federal law would quickly be obliterated" (*id.* at 330 n.* (Burger, C.J., concurring in the judgment)).

Indeed, this Court has already rejected petitioners' theory on at least two occasions. In *Snowden* v. *Hughes*,

"substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner* v. *United States*, 248 U.S. 354, 358 (1919); see also *Bergmann* v. *United States*, 689 F.2d 789, 796 (8th Cir. 1982); *Redmond* v. *United States ex rel. SEC*, 518 F.2d 811, 816 (7th Cir. 1975). Yet, if petitioners' theory were to prevail in this case, then presumably the government's "preemptive" peacekeeping role would lead to a holding that government inaction in the face of strong evidence of the need for action is not just a tort but a Due Process Clause violation giving rise to a substantive right to recover damages under Section 1983 or *Bivens*.

321 U.S. 1 (1944), as in this case, the Court was asked to federalize state law by holding that any violation of state law also constituted a violation of the federal Constitution. The Court rejected any such holding, observing (321 U.S. at 11 (emphasis added; citations omitted)):

> If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. *Mere violation of a state statute does not infringe the federal Constitution.* And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.

See also *Beck* v. *Washington,* 369 U.S. 541, 554-555 (1962); *Hebert* v. *Louisiana,* 272 U.S. 312, 316 (1926); *Barney* v. *City of New York,* 193 U.S. 430 (1904); *Archie* v. *City of Racine,* 847 F.2d at 1215-1218; *Silverman* v. *Barry,* 845 F.2d 1072, 1079 (D.C. Cir. 1988); *Stern* v. *Tarrant County Hosp. Dist.,* 778 F.2d 1052, 1058-1059 (5th Cir.) (en banc), cert. denied, 476 U.S. 1108 (1985).

More recently, in *Pennhurst State School & Hosp.* v. *Halderman,* 465 U.S. 89 (1984), this Court considered the Eleventh Amendment immunity of state officials against injunctive relief based on violations of state law. The Court found an Eleventh Amendment bar to such relief, observing that "[a] federal court's grant of relief against state officials on the basis of state law * * * does not vindicate the supreme authority of federal law" and that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how

to conform their conduct to state law" (465 U.S. at 106). Those pronouncements would be most pointless, however, if (as petitioners contend) every violation of state law is also a violation of the Due Process Clause of the Fourteenth Amendment. "If the alchemist's wand can transmute a violation of state law into a violation of the Constitution, *Pennhurst* will be for naught, federal enforcement of state law the order of the day" (*Archie* v. *City of Racine,* 847 F.2d at 1217).

Board of Regents v. *Roth,* 408 U.S. 564 (1972), in no way supports a contrary result. *Roth* and cases relying on it, such as *Board of Pardons* v. *Allen,* No. 86-461 (June 9, 1987), are interpretations of the *procedural* requirements of the Due Process Clause. See *California* v. *Greenwood,* No. 86-684 (May 16, 1988), slip op. 8. They stand for the proposition that state law is one source of "entitlement[s]" that amount to "more than * * * abstract need[s] or desire[s]" (*Roth,* 408 U.S. at 577) and thus cannot be taken away by the state without constitutionally adequate procedures. Once state-law entitlements have been identified, this Court does not enforce the state law giving rise to those entitlements, but rather tests against the federal Constitution the procedures by which the state deprives a person of those entitlements. See, *e.g., Hewitt* v. *Helms,* 459 U.S. 460, 472-477 (1983). Petitioners, however, have

mounted no challenge to the constitutional adequacy of any relevant Wisconsin procedures.[9]

[9] When the deprivation of such entitlements is undertaken by individual state employees allegedly violating state law rather than through procedures sanctioned by the State itself, the relevant procedures to be tested against the Due Process Clause are the State's remedies (generally tort-law remedies) for the deprivation. *Hudson* v. *Palmer*, 468 U.S. 517, 533-534 (1984); see also *Daniels* v. *Williams*, 474 U.S. at 339-340, 342 & n.19 (Stevens, J., concurring in the judgment). Petitioners undoubtedly have cast this case as a federal action precisely because they wish to obtain more redress than is available under Wisconsin law (see Wis. Stat. Ann. § 893.80(3) (West 1983) (limiting recovery in tort actions against governmental agencies and their employees to $50,000); Massachusetts Committee for Children and Youth Br. 37). Petitioners have nowhere argued, however, that the limitation of liability contained in Wisconsin law renders the State's postdeprivation procedures constitutionally inadequate. Nor would such an argument be plausible. Cf. *Daniels* v. *Williams*, 474 U.S. at 342-343 (Stevens, J., concurring in the judgment) (existence of a sovereign immunity defense, barring recovery altogether against public officials, does not make remedial system constitutionally inadequate).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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